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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

NO. 745

C. L. HILLIARD,

Appellant,

—VS—

CITY OF GAINESVILLE, FLORIDA

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

PETITION FOR REHEARING

RICHARD J. WILSON
Attorney for Appellant
5 Southeast First Street
Gainesville, Florida

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C. L. HILLIARD, Appellant, presents his Petition for a Rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

1. The initial municipal prosecution in the cause herein occurred in March of 1966. In 1967 the Florida Legislature enacted what is popularly referred to as the implied consent law. (Florida Statutes §322.261, 322.262). This act prescribes the procedure to be followed in obtaining evidence from persons accused of driving while intoxicated by making mandatory chem-

ical tests for intoxication. The law also contains the following provisions:

> Any person charged with driving while under the influence of alcoholic beverages to the extent that his normal faculties were impaired shall be entitled to trial by jury according to the Florida Rules of Criminal Procedure. (Fla. Stat. §322.262(4)).

2. Appellant argued below in a Petition for Rehearing filed in the Florida District Court of Appeal, First District, that the implied consent law, although it did not become effective until July 1, 1968, and was therefore not applicable to his case, represented a legislative declaration that the offense of driving while intoxicated was an offense of a serious nature.

3. The District Court of Appeal in denying the Petition for Rehearing expressed the opinion that, even though the law was enacted subsequent to the proceeding under consideration, the legislative classification argument had merit. However, the Court did not feel that the implied consent law applied to municipal prosecutions. On this point the Court said in part:

> Although the argument of respondent is meritorious, we are not prepared to say that the above referred to statute should be construed to be applicable to offenses against municipal ordinances which prohibit the operation of vehicles while under the influence of intoxicating beverages, or that it was not the intent of the legislature to confine jury trials, in cases of this kind only to prosecutions in state courts. If it had been the intent of the legislature to extend the right to trial by jury in cases of this kind to prosecutions in municipal courts, we feel it would have been more specific in so providing in clear and unambiguous terms. (*City of Gainesville* v. *Hilliard*, 207 So.2d 520, 526 [Fla. App. 1968]).

4. In referring to the Florida District Court of Appeal's disposition of the case sub judice, it should be noted that the Court certified the case to the Supreme Court of Florida for the reason that:

> The constitutional right to a trial by jury in any case in which, upon conviction, the offender may be imprisoned is a matter of great public interest and concern to all citizens of the state. We do, therefore, hereby determine and certify that the decision rendered herein is one which passes upon a question of great public interest as contemplated by Section 4(2) Article V, Constitution of Florida. (See Record Item 3, Vol. 1, p. 10).

5. The Florida Supreme Court in not considering the legislative declaration argument stated as follows:

> We pretermit a discussion of Fla. Stat. §322.262 (4) (1967). It was enacted subsequent to the trial of the case at bar, and therefore does not control the result. A decision on its effect must await another day. (*Hilliard* v. *City of Gainesville*, 213 So.2d 689, 691 (Fla. 1968)).

6. Three days before this Court dismissed the appeal herein for want of a substantial federal question, the Circuit Court of the Twelfth Judicial Circuit, in and for Hendry County, Florida, rendered a decision in the case of STATE OF FLORIDA ex rel., JAMES ALLEN DAVIS, Relator, versus FRED C. SIKES as Mayor of the City of Clewiston, a political subdivision of the State of Florida and JOHN M. POTTER, as Municipal Judge, Respondents. The opinion in the Davis case is attached to this Petition for Rehearing. The Court held in Davis that the implied consent law and its jury trial provisions applied to municipal prosecutions.

7. Furthermore, the Circuit Court in Davis, as did the Cir-

cuit Court in the case sub judice, specifically held that driving while intoxicated was not a petty offense saying as follows:

> IT IS FURTHER ORDERED AND ADJUDGED on a matter implicit in this entire case, whether or not a charge of D.W.I. is a crime or a petty offense. This Court finds and determines that not only due to the penal provisions of fine and/or imprisonment adjudged against a person convicted of D.W.I., but under the realities of modern life, the privilege of having a license to drive a car in the State of Florida is a valuable privilege, the loss of which constitutes too great a penalty to be scrubbed off as a petty offense, therefore, this Court does now here rule that the crime of driving while intoxicated is a crime. It is not an offense nor a petty offense, it is a crime.

CONCLUSION

In view of the present litigation in the state Court on this matter and this Court's ruling that the cause sub judice does not involve a substantial federal question, Appellant respectfully requests the Court to remand and return this case to the Supreme Court of Florida for further consideration in light of the Davis decision.

CERTIFICATE OF COUNSEL

I, RICHARD J. WILSON, Counsel for the above-named Appellant, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Richard J. Wilson

RICHARD J. WILSON
Attorney for Appellant
5 Southeast First Street
Gainesville, Florida

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR HENDRY COUNTY, FLORIDA
CASE NO. 68-171

Certified Copy

/s/ Dorothy Moore Clark
DOROTHY MOORE CLARK
Clerk Circuit Court

By: Doris Milicevic, D.C.

STATE OF FLORIDA ex rel.,
JAMES ALLEN DAVIS

Relator,

—vs—

FRED C. SIKES as Mayor of the City of Clewiston,
a political subdivision of the State of Florida and
JOHN M. POTTER, as Municipal Judge,

Respondents.

64631

Filed in Official Records Hendry County, Florida
Time: 2:40 P.M.
Date: January 17, 1969
DOROTHY MOORE CLARK
CLERK CIRCUIT COURT

COURTS RULING

This cause coming on to be heard before this Court on the Relators Suggestion for Writ of Prohibition and the Court having issued its Alternative Writ of Prohibition and upon final hearing that the Alternative Writ be made absolute, and both the Relator and the Respondent having filed Briefs herein, and having presented oral argument to the Court, and the Court being advised in the premise, it is upon consideration found as follows:

On August 9, 1968, the Relator, JAMES ALLEN DAVIS, while operating a motor vehicle in the City of Clewiston, Florida, was arrested for violation of the City of Clewiston municipal ordinance which prohibits driving a motor vehicle while under the influence of alcoholic beverages to the extent normal faculties are impaired.

Relator refused the arresting officer's request to submit to an approved chemical test of his breath for the purpose of determining the alcoholic content of his blood. The arresting officer submitted his sworn statement to the Department of Public Safety pursuant to Section 322.261 Florida Statutes, 1967, that he had reasonable cause to believe Relator had been driving a motor vehicle within the state while under the influence of alcoholic beverages and that the Relator had refused to submit to the test after being requested.

Thereafter, the Department of Public Safety notified Relator that his driving privilege would be suspended unless Petition for a Hearing was filed with the trial court having jurisdiction of the offense of which he stood charged.

The Relator filed a Petition for Hearing and Demand for Jury trial citing that the Petition and Demand were pursuant to Section 322.261 Florida Statutes, 1967.

The Mayor's Court (Municipal Court hereafter) of the City of Clewiston denied Relator's demand for jury trial and set the matter down for trial on November 21, 1968.

Relator filed a Suggestion for Writ of Prohibition with this Court seeking to stop the Municipal Court from trying Relator without a jury on the issue of refusal to submit to a chemical breath test and on the issue of driving while under the influence of alcoholic beverages. This Court issued an alternative Writ of Prohibition.

Four questions were presented in this case. The first question is basically, whether a person accused of driving while intoxicated (hereafter, D.W.I.) is entitled to trial by jury on the merits of his case.

Question two (2) is whether the implied consent law, with its various provisions, under Chapter 322.261 and 322.262, Florida Statutes, 1967, is constitutional.

Question three (3) is whether the provisions under the above cited Statutes, providing for the actions by a Municipal Court in determining the issues of the legality of lawfulness of the procedure by the arresting officer and the Department of Public Safety leading to a revocation of ones drivers license is a trial which would stand in bar of a sebsequent trial on the merits of the D.W.I. and would constitute a double jeopardy.

Question four (4), whether a refusal for a driver to take the chemical test prescribed by Chapter 322.261 and a subsequent revocation of his license based upon such refusal, is a denial of the drivers rights under the Constitution of the United States of America and the State of Florida.

These four (4) foregoing questions are the ones that confront the Court and which the Court will now answer.

Question 1: In Chapter 322.261 the legislature of Florida sets out a comprehensive program in an effort to confront the D.W.I. problem in Florida. This is obviously the legislative purpose of the act and the legislature has, in reliance on the case of *Schmerber* vs. *California,* 384 US 757, 16 L ed. 2nd 908, 86 S Ct 1826, placed a program in effect calling for compulsory chemical tests for intoxication. This act spells out in detail just how this is to be done as a concommitant to having the privilege of a drivers license to operate a motor vehicle on the roads and streets in the State of Florida. The action begins with the peace officer making a lawful arrest. The powers and duties created by this act are extended to Municipal peace officers and the hearings provided in that act can be heard in Municipal Courts or in whatever Court has trial jurisdiction in the matter. In this case the Municipal Court of the City of Clewiston, Florida, was the trial Court having jurisdiction and heard the matter as to the lawfulness of the actions of the Department of Public Safety, in revoking the relators drivers license. Chapter 322.261(f) of the act provides that the Municipal Court can suspend the driving privileges upon a finding of the correctness of the procedures taken by the Department of Public Safety. It would thus appear then, that all the new attacks on the problem of D.W.I. are now extended to all the trial courts of the State of Florida having jurisdiction to try a case of D.W.I. In examining the legislative history of these particular laws we find that this Chapter 322.261 was in effect, actually paragraph one, or section one, of Chapter 67-308, Laws of Florida, 1967, Chapter 322.262 is a section two (2) and section three (3) or paragraphs two (2) and paragraph three (3) of this same law, viz., Chapter 67-308, Laws of Florida, 1967. Therefore, it must be that the two laws we find in the bound statute books under separate Chapter, 322.261 and 322.262, are really part of the same law, that is, Chapter 67-308, Laws of Florida, 1967, and, therefore, they must be read in pari materia with one another. In reading these two

chapters together it must be concluded that the legislature in extending to the Municipalities the power and the jurisdiction conferred by this act, also extended the safeguards of trial by jury provided by Chapter 322.262(4) to a person subject to the act. In view of the foregoing, this Court does now rule and construes this statute to mean that trial by jury is extended under this Chapter to all persons charged with D.W.I. in all the Municipal Courts in the State of Florida, and this Court now finds, and rules, that the Relator, Davis, is entitled by a trial by jury on the offense with which he is charged.

The Respondents able brief at page four (4) tells us that the Municipal Court of the City of Clewiston has the power to provide a jury trial. So be it. The demand for jury trial has been made and under this Courts reasoning above cited, the accused is entitled to a jury trial. In making this ruling the Court is aware of the Case of *Hilliard* vs. *Gainesville,* 213 So. 2nd.689, but as the Supreme Court of Florida said in that case, "we pretermit a discussion of Florida Statutes, Section 322.262(4), 1967 F.S.A. It was enacted subsequent to the trial of the case at bar and therefore does not control the result. A decision of its effect must await another day". That day has now come.

It is altogether fitting and proper that we should do this. Ralph Waldo Emerson, in his Essay on Compensation wrote in effect; that for every wrong there must be a right, for every good there must be a bad, for every positive there must be a negative, for every right there must be a duty, for every darkness there must be a light. This law of Compensation must have been presumed in the collective wisdom of the Legislature of Florida in extending the ability of the police to attack the D.W.I. problem. It probably gave the police a great deal more authority than they did have when they enacted this law and must, by way of compensation, give to all persons accused under it a right of trial by jury, and the Court does now here so rule.

In view of the Courts ruling here most of the questions become moot but do require a ruling by the Court and the Court shall now rule on those.

As to Question Two (2), the double jeopardy problem, the question is; whether the force subjecting of the Defendant to the chemical test provided by the Statutes is unconstitutional. This question is answered that, although it does not comport with this Courts view of things, this Court is bound by the ruling of *Schmerber* vs. *California*, above cited, and it is the ruling here of this Court that the provisions of Chapter 322.261 insofar as same relate to the taking of chemical intoxication tests, are constitutional. The provisions for jury trial which this Court finds to be mandatory eases some of the sting of this but *Schmerber* is still the law of the land. Regardless of that it was closely split decision, this Court is bound by it and has no choice.

We go now to the matter of the hearing provided under these Chapters. This is the hearing by the Court having trial jurisdiction and the question is asked; whether this hearing should be before a jury. The hearing provided fot in Chapter 322.261(e) (f), is not a trial in any sense of the word. There is no issue of the guilt nor innocence nor trial on a crime being determined in this. Instead, it is the Court sitting in a quasi-appellate role to determine if the suspension was lawful. It would be analogized on a hearing on certiorari, much in the same way the appellate court hears matters arising both from Courts and administrative agencies, whether the particular agency involved in this case, whether the Department of Public Safety acted in a lawful manner. It could further be likened to a trial Court ruling on the admissibility or competency of evidence tendered to the Court. It could be further likened to a trial Court hearing a motion for directed verdict with the jury retired. The basic question is not guilt nor innocence, but legal sufficiency of what has been done. In view of the foregoing, the Court answers this

question; is a jury trial allowed in this instance, and the Court answers, no, it is not.

As to Question Three (3), it has been shown above that the hearing provided in Chapter 322.261 is quasi-appellate proceeding and does not constitute a trial, therefore, no jeopardy attaches. In the present instance the matter is moot due to the fact that in this case there has been no arraignment, no plea and no trial on the matter. However, in assuming that a trial has been held on the merits of the D.W.I. case the Court answers Question Three (3); as to whether this hearing constitutes a trial in bar at the trial on the merits through double jeopardy; the Court answers, no, it does not.

In view of the ruling above and upon the authority of *Schmerber* vs. *California,* no answers are required to Relators Question Four (4).

NOW THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The Respondents, City of Clewiston through its Mayor and Judge, be and they hereby are permanently enjoined and prohibited from trying the Relator for the offense charged except by a jury impanelled to hear and determine the issues as provided by law.

2. This Court takes judicial notice that the County Judges Court of Hendry County has concurrent jurisdiction with the Municipal Court of Clewiston and this and all other related matters and if it is found that a jury cannot be provided to this Defendant in the Municipal Court of Clewiston, Florida, and they choose not to proceed in this matter that this ruling here should not be in bar of a trial before the County Judges Court of Hendry County, Florida.

IT IS FURTHER ORDERED AND ADJUDGED on a matter im-

plicit in this entire case, whether or not a charge of D.W.I. is a crime or a petty offense. This Court finds and determines that not only due to the penal provisions of fine and or imprisonment adjudged against a person convicted of D.W.I.; but under the realities of modern day life, the privilege of having a license to drive a car in the State of Florida is a valuable privilege, the loss of which constitutes to great a penalty to be scrubbed off as a petty offense, therefore, this Court does now here rule that the crime of driving while intoxicated is a crime. It is not an offense nor a petty offense, it is a crime.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the Alternative Writ of Prohibition herein before entered by this Court as delineated by the foregoing, be and the same hereby is made ABSOLUTE.

DONE, ORDERED AND ADJUDGED in open Court this 10th day of January, 1969.

/s/ Harold S. Smith

Circuit Judge